

Michigan Law Review

Volume 93 | Issue 8

1995

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Recommended Citation

Marc S. Reiner, *The Public Safety Exception to Miranda: Analyzing Subjective Motivation*, 93 MICH. L. REV. 2377 (1995).

Available at: <https://repository.law.umich.edu/mlr/vol93/iss8/12>

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NOTES

The Public Safety Exception to *Miranda*: Analyzing Subjective Motivation

Marc Schuyler Reiner

INTRODUCTION

In *Miranda v. Arizona*,¹ the Supreme Court announced a set of procedural safeguards to protect a criminal suspect's Fifth Amendment privilege against self-incrimination when being questioned by the police. The Court required that when "an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning," the police must give the suspect the now-familiar pre-interrogation *Miranda* warnings.² The Court subsequently made it clear that *Miranda* warnings were required in every instance of custodial interrogation.³ In *New York v. Quarles*,⁴ however, the Court created a "public safety" exception to the *Miranda* requirements for situations where a threat to public safety compels the police to question a criminal suspect immediately.

In *Quarles*, a young woman approached two police officers and informed them that she had just been raped. She described the perpetrator and told the police that he had just entered a nearby supermarket and that he was carrying a gun. A policeman — Officer Frank Kraft — went to the store and discovered a man — Benjamin Quarles — who matched the description given by the woman. A chase ensued and Kraft temporarily lost sight of Quarles. Upon finding Quarles again, the police arrested him. Kraft frisked Quarles and found an empty shoulder holster. After handcuffing Quarles, Kraft asked him about the location of the gun. Quarles responded "the gun is over there," gesturing to some empty cartons. Kraft retrieved the handgun and then formally arrested Quarles and read him his *Miranda* rights. Quarles waived his rights and then admitted that he owned the gun.⁵

1. 384 U.S. 436 (1966).

2. 384 U.S. at 478. The suspect "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at 444.

3. *Michigan v. Payne*, 412 U.S. 47, 53 (1973); *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966).

4. 467 U.S. 649 (1984).

5. 467 U.S. at 651-52.

During pretrial proceedings on weapons charges, the trial court suppressed Quarles's initial and later statements, finding a *Miranda* violation because the police had failed to advise him of his rights before questioning.⁶ The New York Court of Appeals affirmed the suppression ruling and, as part of this ruling, also explicitly refused to recognize a public safety exception to the *Miranda* requirements because they felt there was no evidence that the officer's motive was to protect either his own safety or the public's safety.⁷

The Supreme Court reversed, creating a "public safety" exception to the *Miranda* requirements.⁸ The Court held that the need for answers in a situation presenting a threat to public safety outweighs the protections afforded by the *Miranda* warnings.⁹ In creating a public safety exception to the *Miranda* requirements, the *Quarles* Court sought to allow officers to obtain information necessary to defuse an emergency. Justice Rehnquist's majority opinion declined to force an arresting officer in a hectic situation to choose between concern for public safety and desire to obtain a conviction.¹⁰

There is considerable confusion among commentators and lower courts about how to decide whether the public safety exception is applicable to a particular case. Many have interpreted *Quarles* as prohibiting any inquiry into an interrogating officer's subjective beliefs and motivations; they claim to look only for objectively reasonable indicia of danger in applying the public safety exception.¹¹ Courts generally consider the facts of *Quarles* — the unknown whereabouts of a weapon in a public place — to be an appropriately objective emergency for these courts.

This Note argues, however, that the appropriate inquiry under *Quarles* is whether an actual and reasonable belief in an emergency motivated the interrogating officer. This Note proposes a two-prong test to facilitate this inquiry. The *subjective motivation* prong evaluates the officer's subjective motivation as revealed by objective factors: the content of the officer's questions, when he asked them, and when the suspect received *Miranda* warnings. The *objective reasonableness* prong looks at the objective circumstances to determine the reasonableness of the officer's belief in an emergency.

6. 467 U.S. at 652-53. For undisclosed reasons, the state failed to pursue rape charges. 467 U.S. at 652 n.2.

7. *People v. Quarles*, 444 N.E.2d 984 (N.Y. 1982), *rev'd*, 467 U.S. 649 (1984); *see also* 467 U.S. at 653.

8. 467 U.S. at 655-56.

9. 467 U.S. at 653.

10. 467 U.S. at 657-58.

11. *See infra* notes 96-105 and accompanying text.

Part I demonstrates that the *Quarles* opinion actually contemplates and requires analysis of the officer's subjective motivation and therefore comports with this Note's test. Part II then fully describes the subjective motivation prong of this Note's test; it outlines which objective factors are most probative of the officer's subjective intent. Part III outlines the objective reasonableness prong of this Note's test; it argues that the perceived danger must be both reasonably substantial and reasonably imminent in order to satisfy this prong. Part IV then argues that courts have implicitly or explicitly looked to an officer's subjective motivation and that doing so best comports with the policies of *Miranda* and *Quarles*.

I. HOW THE *QUARLES* OPINION APPROVES OF EXAMINING SUBJECTIVE MOTIVATION

A very common misinterpretation of the *Quarles* opinion is that it disclaims entirely any inquiry into an officer's subjective motivation.¹² The courts that have prohibited subjective analysis primarily rely on a single passage in *Quarles*. Section I.A argues that the context of that passage actually suggests the necessity of a subjective analysis. Section I.B then argues that other parts of the opinion clearly *require* that the officer has a proper subjective motivation in order for the public safety exception to apply.

A. Context of the Apparent Disclaimer

Several commentators and lower courts that have interpreted the *Quarles* opinion as denying a subjective inquiry rely upon the following language from *Quarles*: "[T]he availability of [the public safety] exception does not depend upon the motivation of the individual officers involved."¹³ Rather than interpreting this language

12. See, e.g., Scott Lewis, *Miranda Today: Death of a Talisman*, PROSECUTOR 18, 20 (Sept./Oct. 1994) ("The officer's subjective motivation for inquiring is irrelevant.") (citation omitted); *Supreme Court Announces "Public Safety" Exception to Miranda*, 52 U.S.L.W. 1193, 1194 (June 19, 1984) [hereinafter *Supreme Court Announces*] ("This public safety exception to *Miranda* carries with it an objective standard . . . [T]he particular officer's subjective motive in questioning the suspect is unimportant.").

13. 467 U.S. at 656. This Note will hereinafter refer to this brief passage as the *apparent disclaimer*.

For a list of courts that misinterpret the disclaimer, see *infra* notes 96-105 and accompanying text. Most of those courts will nonetheless make inquiry into the arresting officer's motivation and even consider the motivation to be a determinative factor.

Commentators have also stated that *Quarles* requires an objective inquiry. Most of the commentaries reaching this conclusion were published immediately after *Quarles*, and are generally Comments or Notes analyzing recent Supreme Court opinions. See, e.g., John Randolph Bode, Comment, *New York v. Quarles: The "Public Safety" Exception to Miranda*, 19 U. RICH. L. REV. 193, 201-03 (1984) ("The *Quarles* Court stated that the availability of the 'public safety' exception should be based on an objective review of the circumstances surrounding the custodial interrogation."); Stephen S. Goodman IV, Note, *Criminal Law — Fifth Amendment Miranda Warnings — An Exception to Administering Miranda Warnings Exists Where Police Questioning is Prompted by Concern for Public Safety*, 16 ST. MARY'S

to mean that an officer's motivation is irrelevant, the immediate context suggests that an arresting officer's improper motivation will not invalidate the public safety exception so long as his actions are also reasonably prompted by a genuine concern for public safety.¹⁴

L.J. 489, 500-01 (1985) (finding an objective test, despite the subjective test outlined in its title: "The existence of the 'public safety' exception was not dependent upon the subjective motivations of an officer . . ."); Mary M. Keating, Note, *New York v. Quarles: The Dissolution of Miranda*, 30 VILL. L. REV. 441, 458 (1985) ("The *Quarles* Court found that the availability of the public safety exception did not depend upon the subjective motivation of the individual officers involved. Thus, the determination of whether a public safety exigency existed was a question for the court, and not the arresting officer."); Sidney M. McCrackin, Note, *New York v. Quarles: The Public Safety Exception to Miranda*, 59 TUL. L. REV. 1111, 1123 (1985) ("Nor does public safety have to be a motive of the questioners; the majority specifically refuses to inquire into the motives of the questioners.") (footnote omitted); James G. Scotti, In re John C. — *An Opportunity for the New York Courts to Save Miranda from the Public Safety Exception*, 62 ST. JOHN'S L. REV. 143, 149 (1987) (maintaining that the Court "adopted an objective test").

Despite concluding that the public safety exception relies on a purely objective analysis, many of these commentators recognized that the *Quarles* opinion contemplates, and even necessitates, inquiry into subjective motivation. See Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 924 (1989) (suggesting that the Court based its ruling on the presence of the proper motivation by the arresting officer); cf. Bode, *supra*, at 202 n.62 ("[T]he intent of the police is [not] irrelevant in determining the availability of the exception. The subjective intent will probably constitute an important factor in the objective analysis.").

14. Most commentators have failed to recognize that a proper subjective motivation by an officer will excuse a simultaneous improper motivation. See, e.g., William T. Pizzi, *The Privilege Against Self-Incrimination in a Rescue Situation*, 76 J. CRIM. L. & CRIMINOLOGY 567, 580 (1985) ("[T]he Court emphasized that the subjective motivation of the officer is not a factor, and courts are to decide whether the particular 'exigency' justified the questions, independent of the officer's intent."). But see Loewy, *supra* note 13, at 924 ("The Court apparently permitted *Quarles*' non-Mirandized statement to be admitted because a legitimate nonevidentiary motive meant that there had been no police misconduct."); Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 810 (1988) ("The officer's alleged perception of danger . . . has now become sufficient to suspend *Miranda*'s protection.") (emphasis omitted).

Those critics who address the Court's discussion of several motives generally fall into two categories. The first group insists that the Court prohibits subjective inquiry, but suggests that such an inquiry would be an appropriate means of applying the exception. For example, Pizzi writes that:

[A]s long as the officer believed that his actions were immediately necessary to ensure public safety and as long as the officer's conduct and belief were reasonable, that ought to be the central consideration in the application of a public safety exception, whether or not there were other objectives that the officer was trying to achieve at the same time.

Pizzi, *supra*, at 583 (footnote omitted). They analogize to self-defense, where one of the motives must be self-preservation, but other motives may also be present. *Id.* The second group assumes that the *Quarles* Court enunciated a purely objective test that permits improper motives, so long as there was a possibility that the officer was concerned with public safety. See, e.g., Scotti, *supra* note 13, at 149-50 ("[T]he Court adopted an objective test in which the exception could be invoked even if the officer's main motive for questioning the suspect was to obtain incriminating evidence, so long as the question could have been reasonably asked out of a concern for the public safety."); *Supreme Court Announces*, *supra* note 12, at 1194 ("If the officer's question could reasonably be said to have been prompted by a concern for public safety, then it passes scrutiny.").

When an officer has several motives, the presence of an improper motive is not determinative of whether the exception applies.¹⁵

The context of the surrounding language in *Quarles* bears out this interpretation.¹⁶ The Court, in explaining the role subjective analysis should play, anticipated that an officer may have several motives: “Undoubtedly most police officers, if placed in Officer Kraft’s position, would act out of a host of different, instinctive, and largely unverifiable motives — their own safety, the safety of others, and *perhaps as well* the desire to obtain incriminating evidence from the suspect.”¹⁷ The Court listed the first two motives — their own safety and public safety — as appropriate instinctive concerns for an arresting officer by stating that an officer “[u]ndoubtedly . . . would act” based upon them. Thus the Court stated that the appropriate time for a court to apply the exception is when an officer is “placed in Officer Kraft’s position” — when he is acting on one of these motives. By permitting the officer to act “perhaps as well” out of an incriminatory purpose, the Court was merely acknowledging the myriad of motivations upon which a police officer may act.

The next paragraph of the opinion further outlines the appropriate situation for the exception’s application and confirms the above analysis. The Court continued: “Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.”¹⁸ The language — “whatever the motivation of individual officers” — might appear to disclaim an analysis of their motivation, but the same sentence

15. *Quarles* cited other situations where the presence of certain motives by an officer was similarly not determinative. 467 U.S. at 656 n.6 (whether “interrogation” occurred, whether a “seizure” occurred, and whether “search incident to arrest” exception applied).

16. The full language of this section of the opinion is as follows:

We hold that on these facts there is a “public safety” exception to the requirement that *Miranda* warnings be given before a suspect’s answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved. In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer. Undoubtedly most police officers, if placed in Officer Kraft’s position, would act out of a host of different, instinctive, and largely unverifiable motives — their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.

Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.

467 U.S. at 655-56 (citation omitted).

17. 467 U.S. at 656 (emphasis added).

18. 467 U.S. at 656.

clearly states that the exception only applies when the officers on the scene are "reasonably prompted by a concern for public safety." In order to determine whether the officers were prompted by such a concern, a court must engage in a subjective analysis.¹⁹ In this context, the language "whatever the motivation" again appears merely to permit improper motivation in a situation in which a proper motivation is also present.

When the Court described the proper questions for officers to ask, it again suggested that an investigatory motivation is permissible so long as a concern for safety accompanies it. The Court called for police officers to "distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed *solely* to elicit testimonial evidence from a suspect."²⁰ The Court distinguished between these different questions, implying that the former questions — those questions that may be partially motivated by a desire to elicit testimony — are permissible, whereas the latter — those with a sole purpose of incrimination — must be excluded. By limiting impermissible questions to those whose *sole* purpose is to produce incriminatory evidence, the Court suggested that the purpose behind a permissible question must, *at least in part*, be a genuine belief in a public safety emergency.²¹

In applying the exception to the facts of *Quarles*, the Court confirmed the argument outlined above. The Court investigated the motivation of the arresting officer and permitted an investigatory motivation because a concern for safety was also present. The Court stated: "Officer Kraft needed an answer to his question *not simply* to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area."²² The Court acknowledged that an improper motive may have been present — the desire to make a case against the suspect — but held that such a motive was permissible when an officer also had a proper motive, such as the desire to secure a dangerous weapon.²³

Several lower courts support this Note's interpretation of *Quarles*'s apparent disclaimer of an inquiry into subjective motiva-

19. See *infra* section I.B.3.

20. 467 U.S. at 658-59 (emphasis added).

21. Furthermore, the Court's reference to an "instinctive" process by the arresting officer appears to contemplate a subjective inquiry. See *infra* section I.B.2.

22. 467 U.S. at 657 (emphasis added). Although the concept of *need* in describing an urgent emergency may be purely objective, the Court's assertions that Kraft himself actually "*needed* an answer" seems to assert that he was personally motivated by the emergency.

23. By permitting the exception, the Court implicitly endorsed this process of analysis. See 467 U.S. at 659 ("The facts of this case clearly demonstrate . . . an officer's ability to recognize [an emergency].").

tion; they have interpreted the *Quarles* opinion as disregarding the improper motives of an officer so long as a genuine concern for public safety also motivates him.²⁴ Other courts tend to put a threshold on the officer's motivation; that is, they require the proper concern for safety to outweigh the motive to incriminate the suspect.²⁵ *Quarles*, however, does not appear to require that the officer's *primary* purpose be safety, only that such a concern is present.

B. *Quarles Endorses Analysis of Subjective Motivation*

A close analysis of *Quarles* shows that application of the public safety exception requires a subjective analysis. Section I.B.1 observes that the Court created this exception specifically to relieve officers of a difficult choice during an emergency — whether to act to secure the emergency or to preserve evidence for use at trial. This section argues that because this difficult choice only arises when an officer has an actual concern for public safety, courts should require such a concern. Section I.B.2 contends that by linking the application of the exception to an officer's instincts, the Court requires a subjective analysis of those instincts. Section I.B.3 argues that the Court framed the proper scenario for the exception in such a way as to require a proper subjective motivation by the arresting officer because the exception only applies in "a situation in which police officers ask questions reasonably prompted by a concern for public safety."²⁶

24. See, e.g., *United States v. Thurston*, 774 F. Supp. 666, 667 (D. Me. 1991) (applying *Quarles* exception when the officer's question "was asked, at least in part, for the protection" of the officers); *People v. Ingram*, 576 N.Y.S.2d 352, 352-53 (App. Div. 1991) (permitting question that "was reasonably prompted by a concern [for safety] and was not solely motivated for the purpose of eliciting testimonial evidence"); *State v. Harris*, 384 S.E.2d 50, 54 (N.C. Ct. App. 1989) (allowing question that was prompted by a concern for public safety and not solely to elicit testimonial evidence); *State v. Camacho*, 487 N.W.2d 67, 75 (Wis. Ct. App. 1992) ("The [public safety] exception does not depend on the inquiring officers' motivations as long as the questions asked are reasonably prompted by a concern for public safety."), *revd.*, 501 N.W.2d 380 (Wis. 1993).

The fact that courts adopt this interpretation far more readily than commentators do suggests that the latter were overstating the difficulty with which a court may apply a subjective analysis. Furthermore, commentators may have overlooked that, in practice, courts will seek to rely upon the legitimate instincts of a police officer, as the *Quarles* Court suggested, when determining if an objective emergency existed. 467 U.S. at 658-59.

25. See *Howard v. Garvin*, 844 F. Supp. 173, 175 (S.D.N.Y. 1994) (holding that "[t]he existence of [information that is potentially indicative of guilt] can hardly forbid the pursuit of the primary objective — public safety"); *People v. Melvin*, 591 N.Y.S.2d 454, 455 (App. Div. 1992) (permitting a question that was "more for the purpose of ascertaining for safety reasons the location of the gun, than [for] secur[ing] evidence of a crime").

26. 467 U.S. at 656.

1. *The Arresting Officer's Difficult Choice*

The difficult choice that the *Quarles* Court sought to eliminate does not exist unless an actual belief in an emergency motivates the arresting officer. One of the primary reasons the Court created the public safety exception was to avoid situations where an officer had to choose between preserving either the public safety or the admissibility of evidence.²⁷ The Court recognized that, when confronted with a public safety emergency, an officer will have to decide whether to risk losing lives or to risk losing incriminating evidence. The *Quarles* Court fashioned the public safety exception to avoid this difficult choice:

We decline to place officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.²⁸

The exception is unnecessary when the officer does not actually believe in an emergency, and thus does not have to engage in the balancing process that the Court sought to prevent. Because the exception is unnecessary when belief in an emergency does not motivate the officer, courts should analyze the officer's motivation before allowing the exception.

Quarles focuses on the arresting officer's on-the-scene balancing process, making an investigation into the officer's actual belief at the crime scene a prerequisite for applying the exception. The Court assumed the arresting officer actually believed that an emergency existed, or else he would have been unable to "consider" the difficult question.²⁹ Similarly, in its initial justification for creating the public safety exception, the *Quarles* Court weighed the "concern for public safety" against the "prophylactic rules" of *Miranda*.³⁰ The term "concern" refers directly to the officer's subjective motivation.³¹ Furthermore, when discussing the desirability of creating a "workable rule," the Court noted that the police "have only limited time and expertise to reflect on and balance" the

27. See Sherwin, *supra* note 14, at 810 ("[T]he majority in *Quarles* . . . invit[ed] the police officers to engage in, and thus be guided by, the same cost/benefit discourse used by the Court.").

28. 467 U.S. at 657-58.

29. 467 U.S. at 657-58.

30. 467 U.S. at 653.

31. Admittedly, the Court could be referring to *society's* concern. It is the police officer, however, who must comply with *Miranda* and it should therefore be his actual concern which must overcome its requirements.

competing concerns.³² Again, the Court contemplates that an officer must have an actual belief in an emergency — otherwise the officer would not have to reflect on the emergency or balance the situation's competing demands. Because the Court repeatedly stressed that the officer's difficult choice — which the exception was created to eliminate — requires an actual belief in an emergency, a lower court must investigate an officer's beliefs before applying the public safety exception.

2. Officers' "Instincts"

In referring to the officer's "instincts," the *Quarles* Court invited a subjective analysis of the officer's motives. The Court stated that the exception would free police officers "to follow their *legitimate instincts* when confronting situations presenting a danger to the public safety."³³ By specifying that the officer's instincts must be "legitimate," the Court requires lower courts to distinguish between legitimate and illegitimate instincts. In order to evaluate these instincts, a court must determine what these instincts actually were. Earlier in the opinion, the Court referred to the officer's "motives" as "instinctive."³⁴ By extension then, the required analysis of an officer's *instincts* should focus on the officer's subjective *motivation*.

3. "Reasonably Prompted"

By stating that the exception applies when an officer asks questions that are "reasonably prompted by a concern for the public safety,"³⁵ *Quarles* expressly calls for an inquiry into the officer's subjective state of mind. The verb tense for "prompted" indicates that the Court contemplated something more than a purely objective standard. By using the past tense without any qualifiers, the Court is requiring that an actual concern for emergency actually *did* prompt the questioning. If the Court had chosen to create a purely objective test it would have instead stated that the exception applies in "a situation that would reasonably prompt a concern for the public safety."³⁶ The *Quarles* opinion, however, states that the ques-

32. 467 U.S. at 658 (quoting *Dunaway v. New York*, 442 U.S. 200, 214 (1979)).

33. 467 U.S. at 659 (emphasis added).

34. 467 U.S. at 656.

35. 467 U.S. at 656.

36. Some commentators who interpret *Quarles* as endorsing an objective standard paraphrase this test with that perspective in mind: The exception applies "when the questioning of the suspect *could have been reasonably prompted* by a concern for the public safety." Scotti, *supra* note 13, at 145 (emphasis added); see also *Supreme Court Announces*, *supra* note 12, at 1194 (framing the test as "[i]f the officer's question could reasonably be said to have been prompted by a concern for public safety"). The fact that these commentators inaccurately paraphrase the opinion in asserting that *Quarles* requires a purely objective analysis is further evidence that *Quarles* itself calls for a subjective analysis.

tions must have been prompted by an *actual* concern for public safety, rather than an unascertained, potential concern.³⁷

Lower courts that have interpreted the "reasonably prompted" language generally recognize that it requires a subjective belief in an emergency.³⁸ In one case, for example, the Minnesota Court of Appeals noted that although the police "had reason to believe"³⁹ that an emergency existed, they were "not reasonably prompted by concern for public safety."⁴⁰ Furthermore, even when courts cite this language and say they are applying an objective test,⁴¹ they likely may resolve the case by looking at the officers' subjective intent.⁴²

II. DETERMINING THE ARRESTING OFFICER'S SUBJECTIVE MOTIVATION

Although the test proposed by this Note analyzes the subjective motivation of the arresting officer, it does not suffer from the failings commonly associated with the much-maligned species known as "subjective tests."⁴³ One of the major complaints about subjective standards is their difficulty in application; motivation can be quite elusive to determine.⁴⁴ The prong of this Note's test that evaluates subjective motivation, however, looks to purely objective, external evidence of an interrogating officer's motives and, to a considerably lesser extent, the officer's testimony. These factors are highly illuminative of subjective intent and are not difficult to monitor.

37. Cf. Pizzi, *supra* note 14, at 580 (noting that the "reasonably prompted" test is a truly subjective one, but maintaining nonetheless that the Court disregarded this test when apparently disclaiming subjective analysis).

38. See, e.g., *United States v. Alfonso*, No. 94 CR.813(HB), 1995 WL 6225, at *3 (S.D.N.Y. Jan. 9, 1995) (finding that the officers' "valid safety concern" satisfied the "reasonably prompted" standard); *Smith v. State*, 646 So. 2d 704, 708 (Ala. Crim. App. 1994) (finding that the "reasonably prompted" test was satisfied when the officer's questions were "solely for the purpose of determining whether the [suspect] was injured"); *People v. Cole*, 211 Cal. Rptr. 242, 249 (Ct. App. 1985) (finding that officer's belief that the suspect had a weapon satisfied "reasonably prompted" test). But see *State v. Duncan*, 866 S.W.2d 510, 511 (Mo. Ct. App. 1993) ("The public safety exception does not depend on the motivation of the individual officers involved but rather whether a reasonable officer would ask instinctively to protect his own safety or the safety of others.").

39. *State v. Hazley*, 428 N.W.2d 406, 411 (Minn. Ct. App. 1988).

40. 428 N.W.2d at 411.

41. See, e.g., *Hill v. State*, 598 A.2d 784, 786 (Md. Ct. Spec. App. 1991) (framing the "reasonably prompted" test as a "situation wherein a reasonable police officer would have perceived as posing a danger").

42. *Hill*, 598 A.2d at 786 (noting the officers acted "out of concern for public safety").

43. For a discussion of why subjective tests are so despised, see *infra* notes 112-16 and accompanying text.

44. See Marla Belson, Note, "Public-Safety" Exception to Miranda: *The Supreme Court Writes Away Rights*, 61 CHI.-KENT L. REV. 577, 584 (1985).

The *Quarles* Court found that an emergency motivated Officer Kraft and it created the exception for similar factual situations.⁴⁵ Furthermore, the fact pattern in *Quarles* presents a paradigm that courts can look to in determining the officer's intent. By imposing this paradigmatic factual pattern upon varying factual scenarios, courts can analyze whether the officer had an actual belief in the emergency. Officer Kraft, the arresting officer, found an empty holster upon frisking the suspect. He *immediately* asked where the gun was — a question *directly limited to* the perceived emergency. After Quarles responded and Kraft located the gun, Kraft placed Quarles under arrest and *instantly* read him his *Miranda* rights before questioning further.⁴⁶ Similarly, courts should require officers to ask questions limited to the perceived emergency, ask them immediately, and then promptly give *Miranda* warnings afterward.

This Part proposes three factors courts must examine when determining if an actual belief in an emergency motivated the officer: First, section II.A argues that the court should analyze the questions that the officer asked to determine how directly the officer focused them on the alleged emergency. Second, section II.B explains why the court should examine the immediacy of the officer's questions relating to the emergency. Third, section II.C contends that the court should consider how promptly the officer gave the *Miranda* warnings after he or she defused the danger. Although the court may consider other factors,⁴⁷ all of the above factors should

45. The *Quarles* opinion often notes that Officer Kraft believed there to be a danger to the public safety. The opinion assumes that Kraft's motivation was to defuse an immediate danger: "Officer Kraft needed an answer to his question . . . to insure that further danger to the public did not result from the concealment of the gun in a public area." 467 U.S. 649, 657 (1984). In addition, the Court commends Officer Kraft for properly recognizing an emergency situation and asking the appropriate questions: "The facts of this case clearly demonstrate . . . an officer's ability to recognize [an exigent situation]." 467 U.S. at 659. The Court chose to apply the exception "on these facts," thereby encouraging courts to repeat this type of subjective analysis. 467 U.S. at 655. Thus, the Court assumed that Officer Kraft acted in good faith and that future courts should require that other officers act similarly before applying the exception. See Pizzi, *supra* note 14, at 582-83 ("[T]he thrust of the majority opinion . . . certainly seemed to imply both that the distinction was drawn properly in this case and that the purpose for which such questions are asked should be of some importance in deciding whether public safety justified the questions."); *Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 149 (1984) ("*Quarles* envisions an officer acting in good faith.").

On the other hand, the New York Court of Appeals decision, reversed in *Quarles*, does not assume that the purpose of the officers was to secure public safety. *People v. Quarles*, 444 N.E.2d 984, 985 (N.Y. 1982) ("[T]here is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety or that the police interrogation was prompted by any such concern."). The New York court did not rule out the possibility of a motivation to secure public safety, they simply refused to speculate because the lower courts with fact-finding jurisdiction made no factual determination on the matter. 444 N.E.2d at 985.

46. 467 U.S. at 652.

47. For example, if the officer blurts out an "excited utterance" that reveals his genuine concern for public safety, the court may use this statement as proof of the officer's actual concern for public safety — even though it is not literally questioning that is subject to *Mi-*

be present before a court permits the *Quarles* exception.⁴⁸ Section II.D then argues for an extremely limited use of the officer's testimony in determining intent.

A. Content of the Questioning

The most important indicator of an officer's subjective motivation is the content of his questioning of the suspect. Questions that are limited to the scope of the perceived danger strongly indicate a belief that the danger was present and that the officer's motive was to secure the danger. Conversely, when an officer asks for general information, he reveals an inculpatory purpose or, at most, only a general concern for safety that is insufficient under *Quarles*.⁴⁹ The *Quarles* opinion certainly supports a test that limits an officer's permissible questions to the emergency at hand.⁵⁰ In addition, lower

randa. See *Harryman v. Estelle*, 616 F.2d 870, 879 (5th Cir.) (Hill, J., concurring) (stating that "[i]f the officer's [excited utterance] . . . was the product of shock or surprise, it cannot be said that he was seeking information"), *cert. denied*, 449 U.S. 860 (1980). Factors like these are few and far between, however, and courts should not use their potential existence as an excuse to deviate from the outlined factors.

48. The satisfaction of these factors is important not because it is conclusive evidence that the officer was concerned for public safety — although it is certainly very persuasive evidence to that conclusion. Rather, the *absence* of any of these factors is powerful evidence that concern for public safety did *not* motivate the officer. If these factors are not satisfied, the officer was probably either delinquent in protecting the suspect's rights or motivated solely by an inculpatory purpose. In either of these situations a court should not allow the *Quarles* exception.

49. *Quarles* appears to reject general concerns as justification for applying the public safety exception. The Court specifically refused to overrule *Miranda's* assumption that the general concern for safety resulting from fewer convictions of guilty suspects was not sufficient to override the added protections of the warnings. 467 U.S. at 656-57; see also Kevin Corr, *A Law Enforcement Primer on Custodial Interrogation*, 15 WHITTIER L. REV. 723, 739 (1994) ("Such questions must deal with true life or death issues and cannot be used as a substitute for standard custodial interrogation which requires *Miranda* warnings.").

A court may only rarely derive a concern for safety from general questions. For instance, in a hostage or kidnapping situation, it may be imprudent for a police negotiator to ask only questions that are specifically directed to the danger. In these situations, the test should be that the officer stops questioning after the danger has been secured. See *People v. Laliberte*, 615 N.E.2d 813 (Ill. App. Ct. 1993); *State v. Kunkel*, 404 N.W.2d 69, 74-77 (Wis. Ct. App. 1987).

50. First, *Quarles* explicitly states that it is the officer's *questions* that the applying court must monitor for intent. 467 U.S. at 656 (requiring that the officer ask "*questions* reasonably prompted by a concern for the public safety") (emphasis added). In addition, the opinion distinguishes questions that are proper — those "*necessary to secure . . . safety*" — from ones that are not — those "*designed solely to elicit testimonial evidence.*" 467 U.S. at 659 (emphasis added); see also Goodman, *supra* note 13, at 506 (interpreting this language from *Quarles* to require the officer "to conform his questioning only to the removal of the danger"). The Court then goes on to praise Officer Kraft for asking "*only the question necessary to locate the missing gun,*" strongly implying that the limiting of his questioning was motivated directly by the perceived emergency. 467 U.S. at 659 (emphasis added). The Court further implies that Officer Kraft intentionally limited his questioning to the emergency by noting that he did not ask "*investigatory questions*" until the scene was fully secure and after giving *Miranda* warnings. 467 U.S. at 659.

The Supreme Court underscored the requirement of carefully limited questions later that year in *Berkemer v. McCarty*, 468 U.S. 420 (1984). In *Berkemer*, the Court clarified that

courts have consistently found the extent of the officer's questioning to be determinative of whether they permit the *Quarles* exception.⁵¹

Quarles permitted officers to ask only questions "essential to elicit information necessary to neutralize the threat to the public." 468 U.S. at 429 n.10.

51. A court is most likely to permit the exception when it finds that the officer limited questioning to the instant emergency, thereby indicating that his actual concern for danger prompted the questioning. See, e.g., *Stauffer v. Zavaris*, No. 93-1358, 1994 WL 532739, at *3 (10th Cir. Sept. 29, 1994) (permitting questions that were "limited . . . to the location of the gun"); *United States v. Knox*, 950 F.2d 516, 519 (8th Cir. 1991) (permitting a single question regarding the location of the weapon); *United States v. Gonzalez*, 864 F. Supp. 375, 381-82 (S.D.N.Y. 1994) (allowing questions "directed toward determining" the existence of an emergency); *Howard v. Garvin*, 844 F. Supp. 173, 175 (S.D.N.Y. 1994) (stressing that the police did not ask questions about what the defendant had done, but only about matters affecting public safety); *United States v. Eaton*, 676 F. Supp. 362, 365-66 (D. Me. 1988) (allowing a question when the officer "asked the bare minimum necessary to determine the whereabouts of the gun"); *People v. Gilliard*, 234 Cal. Rptr. 401, 405 (Ct. App. 1987) (allowing a question "specifically directed only to the recovery of the missing gun"); *People v. Cole*, 211 Cal. Rptr. 242, 248 (Ct. App. 1985) (permitting a single question about a weapon); *In re B.R.*, 479 N.E.2d 1084, 1085 (Ill. App. Ct. 1985) (refusing to apply the exception when officers' questioning lasted "between 5 and 10 minutes"); *Price v. State*, 591 N.E.2d 1027, 1030 (Ind. 1992) (applying the exception when the "only question asked . . . was the location of the weapon"); *State v. Orso*, 789 S.W.2d 177, 185 (Mo. Ct. App. 1990) (allowing questions that were "brief and limited in scope"); *State ex rel. A.S.*, 548 A.2d 202, 205 (N.J. Super. Ct. 1988) (allowing the exception when the officer conducted only "limited questioning"); *People v. Melvin*, 591 N.Y.S.2d 454, 455 (App. Div. 1992) (allowing a single direct question about the whereabouts of the gun); *People v. Hawthorne*, 553 N.Y.S.2d 799, 800 (App. Div. 1990) (same); cf. *United States v. Veilleux*, 846 F. Supp. 149, 154 (D.N.H. 1994) (relying on grounds other than *Quarles* but noting that questioning "limited to the location of defendant's pistol" would likely fit the exception); *State v. Provost*, 490 N.W.2d 93, 96 (Minn. 1992) (relying on the similar "rescue doctrine," but noting that "the limited scope of the officer's questions supports a determination that the primary purpose of the questioning was [to rescue a possible victim]").

Conversely, courts will not allow the exception when an officer asks questions seeking to elicit general information, presumably because these questions reveal a desire solely for incriminatory evidence. See, e.g., *Fleming v. Collins*, 917 F.2d 850, 854 (5th Cir. 1990) (allowing a question regarding who shot the defendant, but not other questions, including whether he had a gun, when the officer had absolutely no reason to suspect that he did), modified, 927 F.2d 824 (5th Cir. 1991); *Eaton*, 676 F. Supp. at 366 (not allowing a question regarding why the defendant was in the area); *State v. Hazley*, 428 N.W.2d 406, 411 (Minn. Ct. App. 1988) (not allowing questioning of *with whom* the defendant was); *In re John C.*, 519 N.Y.S.2d 223, 228 (App. Div. 1987) (not applying the exception when the officer's first question was "a request for an incriminating statement").

Furthermore, many courts interpret narrow questioning to be directly indicative of the officer's concern or motivation. See, e.g., *United States v. Diaz-Garcia*, 808 F. Supp. 784, 788 (S.D. Fla. 1992) (finding "limited questioning" to be "for the purpose of protecting the officers' safety"); *State v. Ramirez*, 871 P.2d 237, 245 (Ariz. 1994) (determining that the proper approach is to look at the "nature and context of the questions" in order to see if they "were motivated by public safety concerns"); *Orso*, 789 S.W.2d at 185 (determining from questions that were "brief and limited in scope" that the officer's "main concern" was safety); *State v. Jackson*, 756 S.W.2d 620, 621-22 (Mo. Ct. App. 1988) (finding the question "Where's the gun?" indicative that officer "was merely trying to determine whether the suspect was unarmed"); *State v. Turner*, 716 S.W.2d 462, 466 (Mo. Ct. App. 1986) (finding that a "brief question, limited in scope" indicated a "purpose of neutralizing a potentially dangerous situation"); *State v. Lopez*, 652 A.2d 696, 699 (N.H. 1994) (finding that officer's restraint from asking incriminatory questions indicates that he did not have an improper motivation).

Even certain courts that purport to apply an objective test recognize that focusing questions on an emergency indicates the officer's concern for safety. See, e.g., *United States v.*

The content of the questions is particularly illuminating because of their innate expressive quality. The officer's questions are akin to windows into his thought process. The officer will ask questions about what directly concerns him. Questions limited to the perceived emergency have a sense of urgency that is absent in more general questions.⁵²

B. *Timing of the Questioning*

The timing of the officer's questions is an important indicator of whether he actually believed in an imminent threat to public safety. If an officer truly believes in the presence of an emergency, he will immediately ask questions necessary to defuse the situation.⁵³ The officer's knowledge of the danger coupled with the immediacy of the question verifies a legitimate noninvestigatory purpose. Conversely, an appreciable delay before questioning about the alleged danger indicates that investigatory considerations, rather than an immediate danger, motivated the officer. There is a general assumption that if a matter is important, it would be mentioned or dealt with earlier rather than later.⁵⁴ Several aspects of *Quarles* support this requirement of immediate questioning.⁵⁵ Furthermore, courts widely consider an officer's immediate questioning as an objective factor that supports applying the *Quarles* exception.⁵⁶

Carrillo, 16 F.3d 1046, 1050 (9th Cir. 1994) (noting that the "narrowly tailored question" was "deliberate" and an "attempt . . . to insure [the officer's] personal safety").

52. See Corr, *supra* note 49, at 739 (noting that questions not limited to the emergency "do not have [a] sense of urgency").

53. The officer may have other important safety concerns that prevent him from asking the question *immediately*. In *Quarles*, for instance, the officer first had to handcuff the suspect before questioning him. 467 U.S. at 652. The officer should interrogate the suspect regarding the emergency as soon as reasonably possible.

Admittedly, it is possible that an officer may be concerned about an emergency and nonetheless determine that asking questions *immediately* would be counterproductive. For example, this may be the case with a mentally ill suspect who would be frightened by immediate interrogation. But these situations are rare, and the court applying the exception may consider them when evaluating whether actual concern for safety motivated the arresting officer. The court may inquire, for example, whether the officer had reason to know about any extenuating circumstances and whether his questioning reflected those circumstances.

54. Similar reasoning justifies the trial technique of impeachment by omission. Whenever a police officer testifies about an important fact that he failed to include in a report made shortly after the incident, opposing counsel may impeach him regarding the fact's omission from the report. See THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 252 (3d ed. 1992) ("The purpose is obvious: If what he is saying now was so significant, why didn't he put it in his report?"). Similarly, if a police officer asserts that a situation was urgent, a judge may justifiably ask: "Well then why didn't you ask about it immediately?"

55. The Court created the exception generally for situations where an "exigency requir[es] immediate action by the officers." 467 U.S. at 659 n.8 (emphasis added). The "action" authorized by the Court is "question[ing] reasonably prompted by a concern for the public safety." 467 U.S. at 656. Therefore, the very situation that activates the exception — exigency — requires immediate action — questioning — regarding it.

56. The courts are more likely to permit questions that an officer immediately asks when confronted with an emergency because it indicates an urgency of purpose to defuse an emer-

Requiring officers to question suspects immediately regarding public safety concerns preserves *Miranda*'s clear set of guidelines and rules for police to follow. When a suspect is in custody, officers know that they have to give certain warnings before questioning him. The requirement that officers automatically deliver these warnings is one of *Miranda*'s strengths. In order to preserve this clarity best — and still have a public safety exception — the officer should now only have two choices as soon as a suspect is in custody: give the *Miranda* warnings, or immediately act to remedy a perceived public safety emergency.⁵⁷ That is, if a police officer believes a threat is serious and imminent enough to warrant suspension of

agency. See, e.g., *United States v. Brutzman*, No. 93-50839, 1994 WL 721798, at *2 (9th Cir. Dec. 28, 1994) (finding a concern for safety by federal agents when questioning about weapons occurred "within the first few minutes of the agents' entry into [the suspect's] home"); *United States v. Knox*, 950 F.2d 516, 519 (8th Cir. 1991) (finding a question admissible because it was an "immediate attempt to locate the gun to eliminate . . . danger"); *People v. Cole*, 211 Cal. Rptr. 242, 248-49 (Ct. App. 1985) (permitting a question about a missing weapon asked right after patdown); *State v. Lopez*, 652 A.2d 696, 698-99 (N.H. 1994) (allowing question about a weapon that the officer asked as soon as he noticed the suspect's empty shoulder holster); *People v. Ratliff*, 584 N.Y.S.2d 871, 872 (App. Div. 1992) (allowing a question posed immediately to help the police understand a chaotic situation); *People v. Ingram*, 576 N.Y.S.2d 352, 352 (App. Div. 1991) (permitting a question intended to locate a missing gun asked immediately after patdown search); *People v. Hawthorne*, 553 N.Y.S.2d 799, 800 (App. Div. 1990) (permitting exception when officer "immediately asked 'where is the gun?'").

When an officer delays his questioning, or prolongs it considerably, a court may fail to see such an urgent motivation and consequently refuse the exception. See, e.g., *United States v. Mobley*, 40 F.3d 688, 693 (4th Cir. 1994) (refusing question asked while suspect was being led away), *cert. denied*, 115 S. Ct. 2005 (1995); *In re John C.*, 519 N.Y.S.2d 223, 228 (App. Div. 1987) (not finding sufficient an "immediate inquiry" when the officer's first question was purely "incriminatory" and the questioning was "intermittent[] for close to one hour"); *State v. Stevenson*, 784 S.W.2d 143, 144 (Tex. Ct. App. 1990) (refusing to allow the exception when the officer delayed in inquiring about the gun's whereabouts because he did not consider the defendant an immediate threat); cf. *Brutzman*, 1994 WL 721798, at *1, *2 (noting the difference in purpose between questions asked "within the first few minutes" or arriving on the scene and those asked in "a three-hour long interview . . . in a private office").

Courts often find that the purpose behind an officer's questioning is legitimate particularly when he asks questions immediately after learning of a danger, even if the suspect has already been in custody for a long time before the questioning. See, e.g., *United States v. Lawrence*, 952 F.2d 1034, 1036 (8th Cir. 1992) (permitting officer's question about the location of the gun asked as soon as the officer became aware that the defendant had been carrying one); *State v. Ramirez*, 871 P.2d 237, 244-45 (Ariz. 1994) (allowing questions asked immediately upon learning of a possible at-large suspect).

Moreover, some courts expressly make the connection between an officer's immediate questioning and his genuine concern for safety. See, e.g., *State v. Orso*, 789 S.W.2d 177, 185 (Mo. Ct. App. 1990) (determining the officer's "main concern," in part, from the fact that the questioning was "immediately following the discovery of [a] body"); *State v. Jackson*, 756 S.W.2d 620, 621 (Mo. Ct. App. 1988) (determining what the officer "wanted to" do from his immediate questioning when unable to locate the weapon). Occasionally, even a court that refuses to consider the subjective motivation of an officer will admit that immediate questioning indicates a genuine concern. See *United States v. Colon Osorio*, 877 F. Supp. 771, 776 n.2 (D.P.R. 1994) ("We are certain that the interrogating agent's motivation was honest. In the heat of the moment, and in a split second, the question was uttered . . .").

57. Cf. *Corr*, *supra* note 49, at 739 ("Law enforcement agencies with a policy of always providing *Miranda* warnings to suspects immediately at the time of arrest may find this policy especially counterproductive in situations where the public safety exception would apply.").

the suspect's *Miranda* rights, he should — and must — ask about it at once.⁵⁸

C. Timing of *Miranda* Warnings

The timing of the *Miranda* warnings may be persuasive evidence of the arresting officer's motivation. In general, *Miranda* requires the police to advise a suspect in custody of his rights before questioning him.⁵⁹ Although the police may legally warn the suspect at any time before interrogation, an officer's purpose to resolve an emergency is more evident if he gives *Miranda* warnings either *immediately after* asking questions related to the emergency or *immediately before* asking *purely* investigatory questions.⁶⁰ This immediate warning reveals the officer's genuine concern for public safety because it shows that the officer did not simply disregard the suspect's right to *Miranda* warnings, but rather, truly believed that an exigent situation justified their temporary suspension.⁶¹ Conversely, giving the *Miranda* warnings immediately before investigatory questions — and after questions properly limited to an emergency — reveals that the officer has instinctively distinguished the two types of questions. The Court in *Quarles* recognized Of-

58. See *United States v. Veilleux*, 846 F. Supp. 149, 154 n.5 (D.N.H. 1994) (interpreting *Quarles* to contemplate a "spontaneous failure to warn prompted by an immediate concern for public safety").

59. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). At least one influential commentator has suggested a more lenient standard:

Aren't you a little surprised that cops still have to read that whole "You have the right to remain silent" speech to every criminal they arrest? I mean is there anybody who doesn't know that by now? Can't they just go, "Freeze, you're under arrest. You ever seen *Baretta*?"

"Yeah."

"Good, get in the car."

JERRY SEINFELD, *SEINLANGUAGE* 91-92 (1993).

60. An arresting officer violates *Miranda* by continuing to question a suspect after he has exercised his right to remain silent. If the officer has already given a suspect the warnings, the court should only apply the exception and permit the answers under certain narrow circumstances. First, some new information must become available to the officer that would reasonably make him aware of an emergency. This requirement ensures that the officer had an objective reason to believe in an emergency. Second, the officer must ask questions limited to that emergency, immediately upon receiving that information. This requirement demonstrates that the officer *actually* believed that an emergency existed. See *supra* section II.A-B.

Courts generally find the officer's appropriate motivation to be dispositive in these situations. See, e.g., *United States v. DeSantis*, 870 F.2d 536, 541 (9th Cir. 1989) (applying exception after warnings when officer asked about the possibility of a weapon "only in response to [the defendant's] request to enter the bedroom" to change clothes); *State v. Meola*, 488 So.2d 645, 646 (Fla. Dist. Ct. App. 1986) (refusing exception when officer asked question after *Miranda* warnings and no new information had emerged).

61. See, e.g., *Meola*, 488 So.2d at 646 (noting that the officer "had already given [the suspect] his *Miranda* rights, thus negating any argument that an emergency existed to justify the question"). Admittedly, advising a suspect of his rights after asking certain questions does not, and should not, instantly make those questions acceptable. Such behavior, however, strongly indicates a legitimate, rather than delinquent, purpose.

ficer Kraft's proper motivation in giving the warnings both directly after securing the emergency⁶² and directly before investigatory questioning.⁶³ In addition, when applying the exception, lower courts frequently consider the timing of the *Miranda* warnings to be a dispositive factor in evaluating an officer's motivation.⁶⁴

Failure to warn instantly after the danger is secured may be consistent with permissible police practice and a court should not refuse the *Quarles* exception because of it.⁶⁵ *Miranda* requires

62. The majority in *Quarles* cited Officer Kraft's questioning process as an appropriate instinctive application of the exception. They praised him for "advising [Quarles] of his rights" directly after asking the question necessary to secure the emergency. *New York v. Quarles*, 467 U.S. 649, 659 (1984).

Later in the same Term, the Court underscored the importance of promptly advising the suspect of his rights after taking care of an emergency: "Once [information necessary to neutralize the threat to the public] has been obtained, the suspect must be given the [*Miranda*] warnings." *Berkemer v. McCarty*, 468 U.S. 420, 429 n.10 (1984). The Court suggested this sequence as a way of emphasizing the narrowness of the *Quarles* exception.

63. While praising Officer Kraft's instincts, the majority in *Quarles* also noted with approval the fact that he gave the warnings *directly before* asking "investigatory questions." 467 U.S. at 659. Furthermore, the dissent by Justice Marshall appears to interpret the majority as calling for warnings given before investigatory questions, rather than after emergency-based questions. 467 U.S. at 680 (Marshall, J., dissenting).

64. Courts have consistently permitted the exception when an officer promptly advises a suspect of his rights after securing the danger. *See, e.g., Smith v. State*, 646 So. 2d 704, 708 (Ala. Crim. App. 1994) (allowing the exception when officer read the subject his *Miranda* rights immediately after finding the location of the shooter); *Smith v. State*, 452 S.E.2d 494, 496 (Ga. 1995) (permitting the exception when the officer began preparing *Miranda* rights forms right after learning the gun's location); *State v. Jackson*, 756 S.W.2d 620, 621 (Mo. Ct. App. 1988) (permitting the exception when officers advised defendant of his rights immediately after securing the gun); *State v. Trangucci*, 796 P.2d 606, 608 (N.M. Ct. App. 1990) (allowing the exception when the officer gave *Miranda* warnings immediately after the officer asked about the location of the gun); *Bryant v. State*, 816 S.W.2d 554, 557 (Tex. Ct. App. 1991) (permitting the exception when the officer advised defendant of his rights immediately after determining there was no further danger).

Some courts explicitly state that the public safety exception should apply when an officer promptly gives the warnings after defusing the emergency because such prompt warnings indicate the officer had an appropriate purpose. *See, e.g., State v. Orso*, 789 S.W.2d 177, 185 (Mo. Ct. App. 1990) (finding that *Quarles* applied "because *Miranda* warnings were timely" after defendant had volunteered information); *State v. Turner*, 716 S.W.2d 462, 466 (Mo. Ct. App. 1986) (finding that the officer's "primary concern" was for safety when he "discontinued his interrogation and shortly thereafter informed defendant of his *Miranda* rights" after determining the gun was in a secure place).

Conversely, many courts will not allow the exception when a delay between the officer's questions and the *Miranda* warnings indicates mere delinquency by the officer and no belief in an emergency. *See, e.g., People v. Strickland*, 570 N.Y.S.2d 712, 713 (App. Div. 1991) (refusing the exception when it was "undisputed that *Miranda* warnings were not administered to defendant until his arraignment"); *In re John C.*, 519 N.Y.S.2d 223, 228 (App. Div. 1987) (not allowing the exception when the suspect was first given his *Miranda* warnings at the police precinct an hour after any danger had passed); *State v. Stevenson*, 784 S.W.2d 143, 145 (Tex. Ct. App. 1990) (refusing the exception when officers had not given the defendant his warnings although he had been identified as the shooter and the weapon had been found long before).

65. Although an officer in a non-emergency setting would not have to give *Miranda* warnings until before investigatory interrogation, there is a colorable argument that an officer in an emergency situation should give the warnings immediately after securing the danger. The questions an officer asks to secure public safety may have an inculpatory quality

warnings *before interrogation* rather than *after custody*.⁶⁶ In other words, an officer is not delinquent if he administers the warnings before investigatory questioning, even if the suspect has been in custody for a long time before receiving warnings.⁶⁷ In addition, a court may justifiably find that concern for safety motivated an officer from the mere fact that he administered the warnings before asking purely investigatory questions, no matter when.⁶⁸

D. Testimony

For lack of a better method, many courts determine the officer's intent from his direct testimony,⁶⁹ but this process is not sufficiently accurate to be the sole method of determining intent. Officers' testimony may be self-serving;⁷⁰ they may either lie about, or perhaps in hindsight misinterpret, what their intent was at the time of the arrest.⁷¹ This section argues that courts should look to an officer's

even if they are legitimately prompted by concern for safety. After answering these questions, a suspect may be more likely to blurt out additional incriminating information voluntarily, under the assumption that he has already incriminated himself. In order to protect against this self-incrimination, it would be best to require warnings immediately *after* the emergency-prompted questioning.

66. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

67. Although *Miranda* does not require automatically warning a suspect upon taking him into custody, it is standard practice for many law enforcement agencies. See Corr, *supra* note 49, at 739. More importantly, it is a desirable practice in that it affords greater protection to individual constitutional rights. If a court wanted to encourage this practice it could refuse the *Quarles* exception unless warnings were given immediately thereafter. See note 57 and accompanying text.

68. See *United States v. Lawrence*, 952 F.2d 1034, 1036 (8th Cir. 1992) (finding that the officer had a "reasonable concern" for safety when he gave the warnings before conducting his investigation, but well after securing the emergency). The *Quarles* Court also may have made this connection. See *supra* note 63 and accompanying text.

69. See, e.g., *United States v. Mobley*, 40 F.3d 688, 697 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2005 (1995) (Harvey, J., concurring) (finding that the officer's testimony regarding her subjective fear was sufficient to support the exception); *United States v. Carrillo*, 16 F.3d 1046, 1049 (9th Cir. 1994) (allowing the *Quarles* exception after the officer testified that before he searches alleged drug dealers he asks them whether they have needles on them because he was once stuck by a needle); *Fleming v. Collins*, 917 F.2d 850, 854 (5th Cir. 1990), *modified*, 927 F.2d 824 (5th Cir. 1991) (using an officer's testimony as evidence that questioning was "consistent with the *Quarles* exception"); *Smith v. State*, 646 So. 2d 704, 707-08 (Ala. Crim. App. 1994) (applying the exception when the officer testified about his "main concern"); *State v. Vickers*, 768 P.2d 1177, 1184 (Ariz. 1989) (allowing the exception when the officer testified that he asked a question in order to determine how to save inmates' lives), *cert. denied*, 503 U.S. 1011 (1992); *People v. Gilliard*, 234 Cal. Rptr. 401, 405 (Ct. App. 1987) (noting the officer's testimony that he asked defendant where the gun was to remove it from a place a child could find it); *Hill v. State*, 598 A.2d 784, 785 (Md. Ct. Spec. App. 1991) (allowing the exception when the officer testified that he was "concerned about the immediate safety of all parties"); *Bryant v. State*, 816 S.W.2d 554, 556 (Tex. Ct. App. 1991) (finding the testimony of the officer that he was "unsure" who shot the victim to be evidence of a concern for public safety); *Dice v. State*, 825 P.2d 379, 382 (Wyo. 1992) (finding the officer's testimony that she asked question "for officer safety" to be evidence of questioning within the *Quarles* exception).

70. See *infra* notes 114-16 and accompanying text.

71. See *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

testimony only if he testifies that a concern for public safety did *not* motivate him.

Lower courts should treat an officer's testimony like a one-way ratchet.⁷² If an officer testifies that his motivation was *not* to protect the public safety, courts should consider the testimony as a conclusive reason not to apply the exception. The testimony has an inherent trustworthiness because it goes against the state's — and likely the officer's — interest.⁷³ As a rule, courts applying *Quarles* already follow this guideline closely.⁷⁴ On the other hand, if an officer testifies that he was properly motivated, the court may feel free to disregard the testimony; there is a regrettable — but inherent — lack of trustworthiness accompanying such an assertion.⁷⁵ The court may use the testimony to corroborate other objective factors indicating a subjective concern for safety,⁷⁶ but it should not use the testimony to replace these factors.

III. OBJECTIVE REASONABLENESS OF THE OFFICER'S MOTIVATION

After initially ascertaining that a genuine concern for public safety motivated the arresting officer's questions, a court applying the *Quarles* exception must ensure that this concern was reasonable. The *Quarles* majority explicitly requires that the officer's belief be reasonable.⁷⁷ The applying court must determine whether a

72. A one-way ratchet is "a bar or wheel with teeth that are engaged by a pawl, usually to prevent reversal of motion." THE RANDOM HOUSE DICTIONARY 740 (1978). For example, a socket wrench that will turn a bolt clockwise but not counterclockwise operates as a one-way ratchet.

73. Cf. FED. R. EVID. 804(b)(3) (allowing an exception to the hearsay rules when an unavailable declarant made a statement against interest).

74. See, e.g., *State v. Meola*, 488 So.2d 645, 646 (Fla. Dist. Ct. App. 1986) (finding that an officer asking a defendant if he had a gun in his car was not within the exception because of testimony that the officer already knew the defendant had a gun there and the police were going to impound the car anyway); *In re John C.*, 519 N.Y.S.2d 223, 228 (App. Div. 1987) (not allowing the exception when "the officer himself" testified that his questions were part of his "investigation" rather than "out of any safety concerns"); *State v. Stevenson*, 784 S.W.2d 143, 144-45 (Tex. Ct. App. 1990) (not allowing exception when officer testified that he did not consider the defendant to be an "immediate threat").

75. See Joe Sexton, *Types of Perjury Common Among Police Officers Are Detailed*, N.Y. TIMES, Apr. 23, 1994, at 27 (discussing a New York mayoral panel that "identified perjury as 'perhaps the most widespread form of police wrongdoing facing today's criminal justice system'").

76. See *United States v. Brutzman*, No. 93-50839, 1994 WL 721798, at *2 (9th Cir. Dec. 28, 1994) (examining testimony for consistency regarding "purpose" and other matters).

77. The first time the Court fully described a situation where the exception applies — other than to describe it simply as "kaleidoscopic" — the Court said it should be "a situation in which police officers ask questions *reasonably* prompted by a concern for the public safety." *New York v. Quarles*, 467 U.S. 649, 656 (1984) (emphasis added). In addition, the Court distinguished *Quarles* from the somewhat similar factual circumstances of *Orozco v. Texas*, 394 U.S. 324 (1969), by noting that the officers' need to protect the public ought to be "objectively reasonable" under the public safety exception. 467 U.S. at 659 n.8.

reasonable police officer under the circumstances would have thought that an immediate and substantial danger existed. Lower courts should insist that two factors are present: an *imminent* perceived threat and a *substantial* perceived threat. *Quarles* specifically contemplates these factors.⁷⁸

Courts are most likely to consider the officer's actual motivation to be the determinative factor in applying the *Quarles* exception.⁷⁹ With very few exceptions, an officer's actual belief in an emergency — as manifested by the factors outlined in Part II — will be objectively reasonable.⁸⁰ The "objectively reasonable" requirement is necessary only to protect against the possibility that a particular officer's subjective reading of a situation will not be reasonable.

This Part presents the mechanics of the objective reasonableness prong of this Note's test. Section III.A first presents factors that a court should look for when determining whether the situation presented an imminent danger. Section III.B then presents the factors that a court should look for when determining whether the danger was substantial enough to permit the exception.

78. First, the Court used the *Quarles* facts as a model of reasonable behavior and highlighted how important the imminency of the danger was by stating that the officers "were confronted with the *immediate necessity*" of finding the gun. 467 U.S. at 657 (emphasis added). Second, the Court wanted to protect officers in a chaotic situation from having to conduct a balancing of social costs. See *supra* section I.B.1. The phrases the Court used to describe the time frame of such a chaotic situations — "a matter of seconds," "only limited time" — indicate that the Court envisioned imminency as a necessary feature of a reasonable danger. 467 U.S. at 657, 658. Finally, when distinguishing *Orozco*, the Court emphasized imminency in its restatement of what constituted an "objectively reasonable need" to protect the public: "[an] exigency requiring immediate action." 467 U.S. at 659 n.8; see also Lewis, *supra* note 12, at 18, 20 ("The 'public safety exception' applies whenever an officer has the need to inquire about an immediate and perceived threat to the public . . .").

The substantiality requirement, perhaps because it is somewhat intuitive, is more difficult to find in the opinion. Nevertheless, the opinion reveals that the Court was only willing to suspend the *Miranda* safeguards when there was a true, substantial danger to public safety. The Court noted that "the cost to society in terms of fewer convictions of guilty suspects" is inadequate to justify suspending *Miranda* warnings. 467 U.S. at 656-57. The Court maintained that the cost must be "more than merely the failure to obtain evidence useful in convicting [a suspect]." 467 U.S. at 657. In other words, there must be a reasonably substantial threat apart from the speculative possibility that a dangerous felon will escape justice.

79. See Pizzi, *supra* note 14, at 584 (noting that "when lower courts decide which cases fall within the public safety exception . . . what the officer was trying to do usually will be the determining factor.") (footnote omitted).

80. See, e.g., *United States v. Mobley*, 40 F.3d 688, 697 (4th Cir. 1994), cert. denied, 115 S. Ct. 2005 (1995) (Harvey, J., concurring) (finding that the officer's concern for safety and "desire to protect other agents . . . support the district court's determination that an objectively reasonable need existed here to protect the police and the public from danger"); *State v. Lopez*, 652 A.2d 696, 699 (N.H. 1994) (finding an emergency to be "objectively clear" when the officer "reasonably believed" that the suspect was armed and dangerous). Almost none of the courts that find — either directly or indirectly — that an emergency actually motivated the officer find that his concern was unreasonable. But see *United States v. Colon Osorio*, 877 F. Supp. 771, 776 (D.P.R. 1994) ("Although the agent's motivation was honest, the fact remains that Colon-Osorio had been handcuffed and safely arrested. The gun had been seized by the FBI agents and the arrest scene was under the agents' control.").

A. *Imminence of the Danger*

When gauging the imminence of a danger to public safety, courts should consider the entire situation as perceived by the arresting officer. For example, a court may consider the nature of the locale or the number of people present. A chaotic crowd of people in a public place often creates an imminent fear for the public's safety because of the danger that a person may at any moment find a missing weapon.⁸¹ When a crowd is disorderly and confusion is rampant, a court is most likely to find the danger was imminent.⁸² Courts do not absolutely require, however, that the locale be public and crowded.⁸³ A well-traveled area⁸⁴ or a private home with children present⁸⁵ may qualify as imminently dangerous situations. In any case, courts should be more reluctant to find that danger to public safety was objectively imminent on private property or in a desolate area, or if other circumstances so indicate.⁸⁶

B. *Substantiality of the Danger*

A court should also examine the circumstances from the officer's perspective when measuring the substantiality of a public safety danger. The court should look to objective factors to determine whether the officer should have suspected or reasonably been aware of the presence of these safety risks. The most important factors that courts should consider are weapons and accomplices. Lower courts tend to allow questions about the whereabouts of accomplices⁸⁷ or guns⁸⁸ if the officer *knows* that they exist, or about

81. See, e.g., *United States v. Brady*, 819 F.2d 884, 888 (9th Cir. 1987) (describing a crowd gathering in a rough neighborhood at nightfall).

82. See, e.g., *People v. Ratliff*, 584 N.Y.S.2d 871, 872 (App. Div. 1992) (robbers posing as victims in a crowd running out of a nightclub).

83. See, e.g., *In re John C.*, 519 N.Y.S.2d 223, 227 (App. Div. 1987) ("Although the *Quarles* case dealt with a large public area, we do not perceive that the Supreme Court intended its reasoning to apply only to such locations.").

84. See, e.g., *Stauffer v. Zavaris*, No. 93-1358, 1994 WL 532739, at *3 (10th Cir. Sept. 29, 1994) (applying the exception where the suspect was arrested and questioned on an interstate highway).

85. See, e.g., *United States v. Antwine*, 873 F.2d 1144, 1147 (8th Cir. 1989); cf. *In re John C.*, 519 N.Y.S.2d at 227 (refusing the exception even though there was a missing gun in a house full of kids because the officers' behavior indicated no belief in an emergency).

86. See, e.g., *People v. Strickland*, 570 N.Y.S.2d 712, 714 (App. Div. 1991) (declining to find a threat to public safety in a "rural residential area"); *Ohio v. Koren*, No. 93-L-092, 1994 WL 738804, at *2 (Ohio Ct. App. Dec. 30, 1994) (same for a "private residence"); *State v. Stevenson*, 784 S.W.2d 143, 145 (Tex. Ct. App. 1990) (same).

87. See, e.g., *People v. Ratliff*, 584 N.Y.S.2d 871, 872 (App. Div. 1992) (allowing police officer inquiry as to the whereabouts one of several fleeing robbers).

88. See, e.g., *Edwards v. State*, 515 So.2d 86, 91 (Ala. Crim. App. 1987) (allowing officer to inquire as to the whereabouts of a gun once the suspect told him that he had killed two people).

the *existence* of accomplices⁸⁹ or guns⁹⁰ if the officer *reasonably suspects* that they may exist. In addition, courts have often found that the possibility of harm to a specified individual — for example, a kidnapped child⁹¹ or the police officer himself — is a reasonably substantial danger as well. In such situations, although an officer may not know the potential means of harm, the potential victim is apparent.

IV. ADVANTAGES OF THIS NOTE'S PROPOSED TEST FOR APPLYING *QUARLES*

In order to remedy the confusion among lower courts over how to apply the *Quarles* exception, this Note proposes a two-prong test. Courts should require that the arresting officer actually be concerned with an emergency, and ensure that the concern was reasonable. In addition, this Note argues *Quarles* itself supports such an approach. This Part argues that this proposed two-prong approach is superior to other possible methods. First, section IV.A maintains that the widespread subjective analysis by lower courts applying *Quarles* indicates that such an analysis is appropriate. Section IV.B then states the policy considerations that support a requirement that the officer's actual concern also be reasonable.

A. *The Reasonableness of an Analysis of Subjective Motivation*

Suggesting that *Quarles* calls for analysis of the arresting officer's subjective motivation is controversial. Virtually all of the commentators and courts who specifically comment on the matter agree that a court should ignore the officer's motives when applying the *Quarles* exception.⁹² Nonetheless, this Note has argued that *Quarles* actually *endorses* an inquiry into subjective motivation. Section IV.A.1 asserts that lower courts — who must apply the *Quarles* exception frequently and consistently — in fact *do* consider the arresting officer's intents and motives. Section IV.A.2 then argues that policy considerations make such an approach desirable.

89. See, e.g., *Fleming v. Collins*, 954 F.2d 1109, 1113 (5th Cir. 1992) (stating that police officer reasonably speculated that there may have been more people involved), *modified*, 927 F.2d 824 (5th Cir. 1991).

90. See, e.g., *United States v. Eaton*, 676 F. Supp. 362, 365 (D. Me. 1988) (stating that officer "knew that the Defendant had a gun permit and that he was therefore likely to have a gun in his possession").

91. See, e.g., *People v. Laliberte*, 615 N.E.2d 813, 819-21 (Ill. App. Ct. 1993).

92. See *supra* note 13; see also *infra* notes 96-105 and accompanying text.

1. How Lower Courts Have Investigated Subjective Intent When Applying *Quarles*

Although lower courts apply the public safety exception in a variety of ways, the vast majority of these courts investigate the arresting officer's subjective intent. The actual behavior of the lower courts therefore supports this Note's use of a test that examines subjective motivation in applying the exception. Despite the widespread misperception by commentators that *Quarles* prohibits inquiry into an officer's subjective motivation,⁹³ in practice most lower courts take into account an officer's subjective beliefs and purposes when applying the public safety exception. Since these courts are the ones who must regularly implement the public safety exception, their investigation into subjective motivation demonstrates the superior utility of such an approach.

Many courts openly inquire into the subjective motivation of the arresting officer without stating whether this method is endorsed by the *Quarles* opinion or not. In other words, these courts make a subjective determination about what the officer was actually trying to do.⁹⁴ These courts investigate subjective motivation using a variety of different terms,⁹⁵ but the implicit assumption is that they be-

93. See *supra* note 13; see also *infra* notes 96-105 and accompanying text.

94. See, e.g., *United States v. Mobley*, 40 F.3d 688, 693 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2005 (1995) (noting that the *Quarles* exception should not be applied if officers are simply "on a fishing expedition" or are otherwise attempting to avoid the strictures of *Miranda*); *Mobley*, 40 F.3d at 697 (Harvey, J., concurring) (finding that the officer acted out of concern for her own safety); *Fleming v. Collins*, 917 F.2d 850, 854 (5th Cir. 1990) (permitting question by officer who testified about the purpose behind the question), *modified*, 927 F.2d 824 (5th Cir. 1991); *State v. Vickers*, 768 P.2d 1177, 1184 (Ariz. 1989), *cert. denied*, 503 U.S. 1011 (1992) (examining the officer's motivation in asking the question); *Bryant v. State*, 816 S.W.2d 554, 557 (Tex. Ct. App. 1991) (making a finding as to what the officer was trying to do).

95. Several of these courts look for the presence of an actual "concern" for safety, or a "belief" in an emergency. See, e.g., *United States v. Lawrence*, 952 F.2d 1034, 1036 (8th Cir. 1992) (finding it dispositive that the officer "had a reasonable concern that" a gun may be found by a child); *United States v. Raborn*, 872 F.2d 589, 595 (5th Cir. 1989) (disallowing question as to location of gun when officers "believed the gun to be" in a truck in police custody); *United States v. Alfonso*, No. 94 CR.813(HB), 1995 WL 6225, at *3 (S.D.N.Y. Jan. 9, 1995) (finding that the presence of a great deal of cocaine justified a "valid safety concern" regarding the presence of others in the apartment); *United States v. Dodge*, 852 F. Supp. 139, 142 (D. Conn. 1994) ("The *Quarles* exception looks to the arresting officer's belief . . ."); *People v. Gilliard*, 234 Cal. Rptr. 401, 405 (Ct. App. 1987) (determining that the test in *Quarles* was that "the officers reasonably believed" in a danger); *Smith v. State*, 452 S.E.2d 494, 496 (Ga. 1995) (allowing the exception when the trial court found that questioning "was asked out of concern for . . . safety"); *Price v. State*, 591 N.E.2d 1027, 1030 (Ind. 1992) (finding that the police had an "immediate concern for the safety of the general public"); *Hill v. State*, 598 A.2d 784, 786-87 (Md. Ct. Spec. App. 1991) (applying exception when officers "reasonably believed" in emergency); *State v. Orso*, 789 S.W.2d 177, 185 (Mo. Ct. App. 1990) ("[T]he officers[]" main concern was to locate [the victim]."); *State v. Koren*, No. 93-L-092, 1994 WL 738804 at *2 (Ohio Ct. App. Dec. 30, 1994) (finding no evidence of a "concern for public safety"); *State v. Stevenson*, 784 S.W.2d 143, 145 (Tex. Ct. App. 1990) ("[I]t is clear he was not concerned for his own safety."). Others look into the arresting officer's "motivation," see, e.g., *State v. Ramirez*, 871 P.2d 237, 245 (Ariz. 1994) (allowing inquiry "motivated

lieve that the *Quarles* opinion endorses their analysis or else they would not apply the exception in this manner.

Several courts, on the other hand, claim to rely solely on an objective inquiry and disclaim any inquiry into the arresting officer's subjective motivation. Nonetheless, these courts covertly consider — and find dispositive — the officer's subjective motivation.⁹⁶ These courts may look to the officer's "purpose";⁹⁷ note that the officers "believed" in an emergency;⁹⁸ determine what "prompted" or "motivated" the officer's actions;⁹⁹ speculate as to the arresting officer's "desire" to control an emergency;¹⁰⁰ note that the officer's

by a need to protect . . . safety"), or his "reason," *see, e.g.*, *State v. Trangucci*, 796 P.2d 606, 608 (N.M. Ct. App. 1990) (interpreting *Quarles* as requiring inquiry into the "reason for the questioning"), or "purpose" in questioning the suspect, *see, e.g.*, *United States v. Antwine*, 873 F.2d 1144, 1147 (8th Cir. 1989) (finding dispositive that the lower court held that the officer's "sole purpose" was to defuse an emergency); *United States v. Webb*, 755 F.2d 382, 392 n.14 (5th Cir. 1985) (noting that the negotiators' "primary purpose" was preserving the defendant's safety); *Smith v. State*, 646 So. 2d 704, 708 (Ala. Crim. App. 1994) (noting that the officer's question "was asked solely for the purpose of determining whether the [individual] was injured"); *People v. Melvin*, 591 N.Y.S.2d 454, 455 (App. Div. 1992) (noting that question was "more for the purpose" of securing a danger than for incriminatory purposes).

Regardless of the term used, courts often find the presence of an actual belief, concern or motivation to be dispositive in applying the exception. *See, e.g.*, *Lawrence*, 952 F.2d at 1036 (finding dispositive that the officer "had a reasonable concern that" a gun may be found by a child); *Raborn*, 872 F.2d at 595 (not permitting question as to location of a gun when officers "believed the gun to be" in a truck in police custody); *United States v. Diaz-Garcia*, 808 F. Supp. 784, 788 (S.D. Fla. 1992) (finding dispositive that the questioning "was for the purpose of protecting the officers' safety"); *Koren*, 1994 WL 738804, at *2 (refusing the exception when there was no evidence of "concern for public safety"); *Bryant*, 816 S.W.2d at 557 (finding what the officer was trying to do determinative). More frequently, however, a lower court will interpret *Quarles* as requiring subjective inquiry but that analysis is not a factor in the court's holding. *See, e.g.*, *Antwine*, 873 F.2d at 1147 (interpreting *Quarles* as applying when questions are "justified by an officer's legitimate concern for someone's safety"); *Webb*, 755 F.2d at 392 n.14 (not relying upon *Quarles* but finding that it would apply because the defendant's safety was "of primary concern to the negotiators, and the negotiators primary purpose" was preserving his safety); *Trangucci*, 796 P.2d at 608 (interpreting *Quarles* as requiring a proper "reason for the questioning").

96. The apparently inconsistent practice of these courts demonstrates that a subjective inquiry is inherently easy to conduct and a natural element in applying the exception. *See infra* note 106 and accompanying text.

97. *See, e.g.*, *People v. Howard*, 556 N.Y.S.2d 940, 942 (App. Div. 1990) (noting that the officer's question was "more for the purpose of clarifying the situation" than for securing evidence of a crime) (quoting *In re John C.*, 519 N.Y.S.2d 223, 228 (App. Div. 1987)).

98. *See, e.g.*, *State v. Lopez*, 652 A.2d 696, 699 (N.H. 1994) ("[The officer] reasonably believed that [the suspect] had just committed two ruthless assaults.").

99. *See, e.g.*, *United States v. Brutzman*, No. 93-50839, 1994 WL 721798, at *2 (9th Cir. Dec. 28, 1994) (holding that the exception applies "[w]hen an officer's questions result from [safety concern] motivations" and finding that the instant officers asked questions "out of an objectively reasonable concern for . . . safety"); *United States v. Mobley*, 40 F.3d 688, 693 (4th Cir. 1994) (refusing to apply the exception when no public safety emergency "motivated the questioning"), *cert. denied*, 115 S. Ct. 2005 (1995); *People v. Strickland*, 570 N.Y.S.2d 712, 715 (App. Div. 1991) ("[The officers'] questioning was prompted in our view by [an incriminatory] desire . . .").

100. *See, e.g.*, *United States v. Brady*, 819 F.2d 884, 888 (9th Cir. 1987); *Strickland*, 570 N.Y.S.2d at 715 (refusing to apply the exception because of a solely incriminatory "desire").

proper actions were "deliberate";¹⁰¹ or even explicitly arrive at their decisions from a "subjective standpoint."¹⁰² Courts of this type may find the officer's subjective motivation to be dispositive, or at the very least important.¹⁰³ The fact that courts which *disclaim* a subjective approach end up speaking in subjective terms is further proof as to how natural and appropriate a subjective analysis is.

Another set of courts misinterprets *Quarles* as prohibiting subjective inquiry and does not conduct covert inquiry into the officer's motivation, but these courts nevertheless place great weight on objective factors that reflect the officer's subjective intent. For example, if the officer limits his questions to the perceived danger, asks them immediately upon recognizing the danger, and ceases pre-*Miranda* questioning when the danger has dissipated — factors that Part II argues reflect a subjective belief in an emergency¹⁰⁴ — these purportedly objective courts will find that *Quarles* applies.¹⁰⁵ This tendency indicates that even when courts fail to use subjective terms in their analysis, the officer's actual subjective motivation will nonetheless persuade most courts.

101. See, e.g., *United States v. Carrillo*, 16 F.3d 1046, 1050 (9th Cir. 1994) ("[T]he officer's deliberate refusal to pursue the subject heightens our confidence that, in this case, the narrowly tailored question was a reasonable attempt to insure [safety].").

102. See, e.g., *United States v. Gonzalez*, 864 F. Supp. 375, 382 n.7 (S.D.N.Y. 1994).

103. See, e.g., *Brutzman*, 1994 WL 721798, at *2 (finding that the exception applied because the officers asked questions "out of an objectively reasonable concern for . . . safety"); *Brady*, 819 F.2d at 888 (finding the fact that the officer's questions "arose from his concern with public safety" to be dispositive); *State v. Jackson*, 756 S.W.2d 620, 621-22 (Mo. Ct. App. 1988) (finding what the officer was "trying to" do to be dispositive); *State v. Turner*, 716 S.W.2d 462, 466 (Mo. Ct. App. 1986) (finding determinative that the officer's "primary concern . . . was to locate the gun and prevent additional deaths or injuries"); *State v. Lopez*, 652 A.2d 696, 699 (N.H. 1994) (finding that the officer's "reasonabl[e] belie[f]" satisfied the requirements of the exception); *Strickland*, 570 N.Y.S.2d at 715 (finding no "public safety crisis" when the officer "was prompted" by an incriminatory "desire").

104. See *supra* notes 49-68 and accompanying text.

105. See, e.g., *People v. Laliberte*, 615 N.E.2d 813, 821 (Ill. App. Ct. 1993) (applying the exception when officer ceased questioning upon learning the location of the kidnapped baby and did not resume until after defendant gave a written waiver of his *Miranda* rights); *State ex rel. A.S.*, 548 A.2d 202, 205-06 (N.J. Super. Ct. App. Div. 1988) (finding an objective "serious danger to the public" that was addressed by "limited questioning"); *State v. Hoyer*, 506 N.E.2d 1190, 1192 (Ohio Ct. App. 1986) (finding a danger when an officer asked where the gun was immediately upon finding bullets on the defendant). *Laliberte* is unique case because the court was simultaneously applying both the public safety exception and the "rescue doctrine." The court explicitly distinguished the two exceptions because the latter has a clear subjective element. 615 N.E.2d at 821. In any case, the court stated that these facts satisfied both exceptions. 615 N.E.2d at 821.

Admittedly, an objective court may occasionally allow the exception even though these three factors indicate no actual belief on behalf of the officer. See, e.g., *United States v. Edwards*, 885 F.2d 377, 384 (7th Cir. 1989). Conversely, a court may even refuse the exception despite an explicit admission that the officer's "motivation was honest" based upon his immediate interrogation. See, e.g., *United States v. Colon Osorio*, 877 F. Supp. 771, 776 n.2 (D.P.R. 1994).

The fact that most courts applying *Quarles* investigate the officer's motivation is illuminating for several reasons. First, the fact that many courts apparently repudiate subjective inquiries but nonetheless conduct one indicates that this inquiry is natural, perhaps even inevitable. Their inability to resist investigating the arresting officer's motivation — and the fact that they do not even appear to notice their inconsistency — underscores the natural fit of such an investigation in applying this exception. Even among those who believed when *Quarles* was decided that the opinion forbids all subjective inquiry, there was some speculation that lower courts would nonetheless find the officer's motivation to be determinative.¹⁰⁶

Second, these are the courts that need to make sense of the public safety exception and apply it on a regular basis. The fact that so many courts require evidence of an actual belief in a public safety emergency before they will apply the exception indicates that such a requirement makes sense. Lower courts — explicitly or otherwise — reject the idea that they may apply the public safety exception without first finding that the officer actually believed in an emergency.¹⁰⁷

2. Policy Advantages of Inquiry Into Subjective Motivation

This section argues that several policy considerations make examining an officer's subjective motivation desirable. First, a public safety exception based upon subjective concern is the easiest for police officers to administer. Second, a subjective test is effective in deterring police misconduct. Third, determining the officer's subjective motivation is not a very difficult task. Finally, this section argues that the test proposed by this Note is a reliable indicator of an officer's actual subjective motivation.

Requiring that an officer have an actual belief in a threat to public safety will limit the extent to which the public safety exception "blurs the edges of the clear line" established by *Miranda*.¹⁰⁸ The reading of *Miranda* rights has become a standard arrest procedure reflexively preformed by officers. In order to best preserve this instinctive application of *Miranda*, the officer must discard it *only* when he instinctively believes an emergency is present. The

106. See Pizzi, *supra* note 14, at 583-84 ("One suspects that for all the talk in *Quarles* about the irrelevance of the motive of the police officer, when lower courts decide which cases fall within the public safety exception . . . what the officer was trying to do usually will be the determining factor.").

107. Cf. *id.* at 583 ("To try to erect a public safety exception to *Miranda* that works independently of a genuine concern for public safety on the part of the officer is awkward at best.").

108. *New York v. Quarles*, 467 U.S. 649, 663 (1984) (O'Connor, J., concurring in part and dissenting in part).

Quarles majority recognized the importance of an exception that is easy to apply for the arresting officer and, in doing so, implicitly endorsed a subjective inquiry by referring to the officer's "legitimate instincts": "The exception which we recognize today, far from complicating the thought processes and the on-the-scene judgments of police officers, will simply *free them to follow their legitimate instincts* when confronting situations presenting a danger to the public safety."¹⁰⁹ Officers can have confidence that their *own* reasonable belief in an emergency will be sufficient for the exception. That is, they are left with the simple choice of complying with *Miranda*'s strictures or following their subjective instincts regarding the presence or absence of an emergency.

Examining an arresting officer's intent will also best deter certain kinds of police misconduct. The Court has previously held that the "prime purpose [of the exclusionary rule] is to deter future unlawful police conduct."¹¹⁰ Courts cannot deter unintended violations of *Miranda*; to the extent that courts can deter *Miranda* violations, they can only deter "consciously undertaken" violations.¹¹¹ Although an officer's actual belief in an emergency may not prove there really is such an emergency, the *absence* of such a belief proves that an officer has consciously disregarded a suspect's *Miranda* rights. Limiting the *Quarles* exception to situations where the officer actually believes in an emergency will create disincentives for police to consciously discard a suspect's Fifth Amendment rights.

Although some commentators argue that a subjective test is too difficult and time-consuming, examining an officer's subjective motivation will not substantially increase the burden on courts any more than a purely objective test would. Opponents of a subjective test argue that a purely objective test is superior because it does not require courts to shine a light through the often murky waters of individual motivation.¹¹² Their argument is that a purely objective test only adds one step to the *Miranda* inquiry. *Miranda* requires a court to determine first if there was custody and interrogation and then whether the officer properly warned the suspect of his *Miranda* rights. A purely objective test for *Quarles* adds the addi-

109. 467 U.S. at 659 (emphasis added). For an analysis of the Court's discussion of "instincts," see *supra* section I.B.2.

110. *United States v. Calandra*, 414 U.S. 338, 347 (1974).

111. *Brewer v. Williams*, 430 U.S. 387, 424 (1977) (Burger, C.J., dissenting) (asserting that an exception should exist to the *Miranda* rule when police act in good faith since no deterrence of illegal police conduct is accomplished by excluding relevant evidence); John M. Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 187-88 (1979).

112. See Bode, *supra* note 13, at 204 (criticizing *Quarles* for "inject[ing] subjectivity into the already overburdened fact-finding process").

tional inquiry of whether an objectively reasonable emergency justified the suspension of *Miranda* warnings.

Although requiring a subjective belief in such an emergency could add one more step to a court's inquiry, this Note's test will usually require a court to perform only one step; a court need not inquire further if it finds an officer lacked an actual belief in a public safety emergency. Alternatively, if a court does find that an officer actually believed in a public safety emergency, the inquiry into whether that belief was objectively reasonable will almost certainly not be extensive; the belief of an experienced officer in an emergency is probative evidence that one existed.¹¹³

Furthermore, the lack of trustworthiness frequently associated with subjective tests is not present in this Note's test. Courts often reject subjective tests because they typically rely on self-serving testimony. For example, the Supreme Court has held that an objective test is the appropriate mechanism for deciding whether a suspect is "in custody" for the purposes of *Miranda*.¹¹⁴ The Court endorsed such an objective, reasonable-person test because, "unlike a subjective test, it 'is not solely dependent . . . on the self-serving declarations of the police officers'"¹¹⁵ At the root of the disdain for subjective tests is the widespread concern that police officers, who are experienced at testifying in court proceedings, will simply give canned testimony attesting that they "honestly believed" in an emergency.¹¹⁶

But an inquiry into subjective motivation does not have to rely upon unreliable testimony.¹¹⁷ Determining an officer's intent may seem like an unwieldy ordeal, but courts regularly look to a defend-

113. See *supra* notes 79-80 and accompanying text.

114. See *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

115. *Bode*, *supra* note 13, at 204 n.35 (quoting *People v. P.*, 233 N.E.2d 255, 260 (1967)).

116. See *supra* note 75 and accompanying text.

117. The Court in *Quarles*, for example, conducted its inquiry into Officer Kraft's subjective motivation without reference to his testimony. It noted that the New York Court of Appeals "declined to recognize an exigency exception to the usual requirements of *Miranda* because it found no indication from Officer Kraft's testimony at the suppression hearing that his subjective motivation in asking the question was to protect his own safety or the safety of the public." *New York v. Quarles*, 467 U.S. 649, 653 (1984). This assessment of the lower holding is accurate in that the Court of Appeals did not make *any* finding regarding a public safety motivation, proper or improper. The *Quarles* Court did not, however, *deny* that an emergency motivated Officer Kraft; the Court's omission was solely because the prosecutor did not advance an exigency-exception theory. *People v. Quarles*, 444 N.E.2d 984, 985 (N.Y. 1982).

This assessment is also informative because it demonstrates that the Court showed no hesitation about deriving an officer's subjective motivation based upon non-testimonial factors. The Court did not deny that Officer Kraft's testimony did not explicitly state a concern for public safety. 467 U.S. at 653. Nonetheless, the Court contemplates throughout its opinion that Officer Kraft was genuinely concerned about the danger that a missing gun may pose. See *supra* note 46 and accompanying text. The Court therefore was willing to determine subjective motivation based upon non-testimonial factors alone.

ant's intent as an element of a crime.¹¹⁸ When examining a defendant's intent, courts may only pay cursory attention to his testimony and more thoroughly examine his objective conduct. For example, if a defendant testifies that he was under duress when he committed a crime, evidence that he was not genuinely afraid — such as objective evidence that he acted calmly — would be dispositive of an actual intent to commit the crime of his own volition.¹¹⁹ Similarly, the courts can examine an arresting officer's intent through external factors.

B. *The Reasonableness of a Reasonableness Requirement*

The arresting officer may honestly believe in the presence of an exigent danger, but the court must examine that belief closely in order to prevent expansion of the *Quarles* exception. An exception based solely on the subjective motivation of the questioning officer may end up swallowing the "narrow exception to the *Miranda* rule" created by the *Quarles* court.¹²⁰ In order to rein in the exception, courts should apply a set of simple, objective guidelines that no officer may violate.

The officer's belief must be reasonable primarily to guard against two sets of police officers. The first set is the Barney Fifes,¹²¹ those rare, easily scared police officers who will perceive danger in just about any situation. If the exception relied only upon the officer's actual concern, these officers might never give *Miranda* warnings due to their easily triggered fear.

The second set is the John Kellys,¹²² the veteran police officers who know how to exploit the letter of the law to their advantage. Absent a requirement that the situation be reasonably dangerous, these officers could fake an actual concern for safety by carefully fulfilling the subjective motivation prong of this Note's test. For example, they could immediately interrogate a suspect with a single question regarding a generic safety concern and then instantly give the *Miranda* warnings afterward. Without a reasonableness requirement to measure actual concern, these officers' *Miranda* warnings would likely begin: "Where's the gun? You have the right to

118. Cf. Pizzi, *supra* note 14, at 583 ("[J]ust as the heart of criminal law is a question of intent, in determining whether an officer has violated the Constitution, the logical starting point must be an understanding of what the officer was trying to do.").

119. See *Leading Cases of the 1983 Term*, *supra* note 45, at 149 (stating that "the [*Quarles*] majority nowhere explains why a desire 'to obtain incriminating evidence' should be harder to detect than so metaphysical a notion as a 'will overcome'").

120. 467 U.S. at 658.

121. Named after the extremely nervous deputy played by Don Knotts on *The Andy Griffith Show* (CBS television broadcast, 1960-68).

122. Named after the detective played by David Caruso on *NYPD Blue* (ABC television broadcast, 1993-present).

remain silent" Even a loose requirement that an officer's concern must be reasonable — for example, that the officer had a reason to suspect an emergency — will eliminate just about all of these pretextual situations. Additionally, a court that carefully limits the officer's questioning to the perceived danger — as mandated by section II.B — can eliminate questions about generic safety concerns.

CONCLUSION

On its face, inquiry concerning an officer's subjective motivation seems desirable; it is sensible to require an officer to base his actions on a belief that he is acting legally. After all, the legal system can only deter violations of constitutional rights that an officer rationally commits. In addition, an analysis of an officer's subjective motivation at the crime site is particularly desirable with respect to an exception that relies on the presence of an actual emergency. Without having to prove his actual concern for public safety, an officer could unwarrantedly ask certain questions, later state that an emergency existed, and then provide illegally acquired evidence — perhaps a gun found as a result of the interrogation — as *post hoc* proof of an emergency.

Ironically, fear of a similar *post hoc* justification by police officers has generally *prevented* courts from overtly analyzing subjective motivation. Courts are understandably afraid that officers may distort the truth about their on-site motivation and consistently proclaim in court that an actual concern for safety motivated their questioning. It is precisely this suspicion that keeps many courts from openly asking officers exactly what they were thinking at the arrest scene.

This Note, however, enumerates several objective criteria that courts may use to determine whether concern for an emergency actually motivated an arresting officer. Courts can evaluate these factors to determine an officer's subjective motivation and free themselves from having to rely upon the officer's often self-serving testimony. Admittedly, the presence of these criteria is not a perfect confirmation that the officer actually believed in an emergency situation; it is conceivable that an officer might satisfy these criteria despite no belief in an emergency. The *absence* of this objective evidence indicating actual concern, however, is almost conclusive evidence that an emergency did *not* motivate the officer. Additionally, this Note requires that the police officer have an objective reason to believe in an emergency in order to prevent disingenuous assertions of proper motivation.

Evaluating an officer's subjective motivation may not be practicable for all potential constitutional violations, but this Note main-

tains that subjective inquiry is wholly appropriate when a public safety emergency allegedly prompts interrogation by an officer. The officer's subjective motivation is relatively easy to determine because his questioning technique acts as a window into his thought process. Furthermore, the officer's motivation takes on an added relevance in the context of an exigency-based exception; if an emergency is to justify suspension of *Miranda* rights, certainly an officer should actually believe in the emergency. This Note facilitates the determination of the officer's true motivation in these situations.